TEKAD URUS SDN BHD

v.

PENDUDUK-PENDUDUK YANG MENDUDUKI KAWASAN YANG DIPANGGIL DESA PERWIRA

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
MOHD GHAZALI YUSOFF JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: J-02-824-2002]
10 MARCH 2004

CIVIL PROCEDURE: *Summary proceedings - Possession of land - Whether O. 89 Rules of the High Court 1980 applicable - Whether occupants of land sought to be evicted were not squatters simpliciter - Whether triable issues that could not be dealt with summarily*

The appellant herein appealed against the dismissal of its application under O. 89 of the Rules of the High Court 1980 ('RHC') in respect of a piece of land ('the subject land'). The appellant was unable to proceed with a development project on the subject land due to the respondents' occupation of the said land. The appellant contended that the respondents entered the subject land illegally and established a settlement thereon. The respondents contended that the state authority had consented to their continued occupation of the subject land by supplying them with public amenities and allocating funds for the development of their settlement.

Held (dismissing the appeal):
Per Alauddin Mohd Sheriff JCA

[1] The alleged continued consent of the appellant's predecessors-in-title was a serious issue to be tried. Even if the respondents' initial entry on the subject land was unlawful as alleged by the appellant, acquiescence made such entry lawful. (pp 523 g & 524 b)

[2] The respondents had been in occupation on the subject land since 1988. This fact was well within the Federal Land Commissioner and the state government whose departments and agencies had provided public amenities to them. With the availability of such evidence, an issue arose as to whether the conduct of the government agencies could be interpreted as consent of the state authority. This was a triable issue. (p 524 c-d)

[3] The evidence showed that although the state government knew of the respondents' presence on the subject land from July 1989 no action was taken to charge them under the National Land Code for illegally occupying the subject land. Also, no proceedings had been taken to evict them under O. 89 RHC. There was an arguable case that the respondents occupied the subject land with the acquiescence of the state authority. As such, they were not squatters simpliciter. There were issues to be tried that should not be dealt with summarily under O. 89 RHC. (p 524 d-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu merayu terhadap penolakan permohonannya di bawah A. 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang bersangkutan dengan sebidang tanah ('tanah tersebut'). Perayu tidak dapat meneruskan dengan projek pembangunannya di atas tanah tersebut kerana tanah tersebut telah diduduki oleh responden-responden. Perayu mengatakan bahawa responden-responden telah memasuki tanah tersebut secara haram dan telah membina penempatan di situ. Responden-responden mengatakan bahawa pihak berkuasa negeri telah menyediakan berbagai kemudahan awam dan telah juga memberi bantuan kewangan bagi memajukan penempatan mereka, dan kerana itu telah mengizinkan pendudukan berterusan mereka di tanah tersebut.

Diputuskan (menolak rayuan):
Oleh Alauddin Mohd Sheriff HMR

[1] Kebenaran berterusan yang dikatakan telah diberikan oleh pemilik terdahulu tanah tersebut adalah satu isu yang perlu dibicarakan. Jika pun pendudukan awal responden-responden di atas tanah tersebut adalah secara haram sebagaimana yang didakwa perayu, persetujuan telah membuatkan pendudukan tersebut sah.

[2] Responden-responden telah menduduki tanah tersebut sejak 1988. Fakta ini disedari oleh Pesuruhjaya Tanah Persekutuan dan juga kerajaan negeri, di mana jabatan-jabatan dan agensi-agensinya telah membekalkan kemudahan-kemudahan awam berkenaan kepada mereka. Dengan keterangan ini, persoalan telah berbangkit sama ada tindakan agensi-agensi tersebut boleh ditafsir sebagai menandakan persetujuan oleh kerajaan negeri. Ini satu isu yang perlu dibicarakan.

[3] Keterangan menunjukkan bahawa walaupun kerajaan negeri mengetahui akan kehadiran responden-responden di atas tanah tersebut sejak Julai 1989, tiada tindakan diambil untuk mendakwa mereka di bawah Kanun Tanah Negara kerana menduduki tanah tersebut secara haram. Juga, tiada prosiding telah diambil bagi mengusir mereka di bawah A. 89 KMT. Terdapat kes yang munasabah bahawa responden-responden telah menduduki tanah tersebut dengan persetujuan kerajaan negeri. Oleh itu, mereka bukanlah setinggan simpliciter. Terdapat isu-isu yang perlu dibicarakan yang tidak boleh diputus secara terus melalui A. 89 KMT.]

Case(s) referred to:

Bohari Taib & Ors v. Pengarah Tanah & Galian Selangor [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 SC ***(foll)***

Salim Ismail & Ors lwn. Lebbey Sdn Bhd (No 2) [1997] 1 CLJ 102 CA ***(refd)***

Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor [1998] 1 CLJ 74 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 89 r. (1)

For the appellant - Maidzuara Mohammed (Fairuz Abdullah & Tharminder Singh); M/s Sabaridin Ali & Co

For the respondent - Raja Badrol Hisham; M/s Raja Badrol Hazman

[Appeal from High Court, Johor; Originating Summons No: MT4-24-36-2002]

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff JCA:

Factual Background

This appeal arises from the dismissal of the appellant's application for a summary order pursuant to O. 89 of the Rules of the High Court 1980 ("the Rules") in respect of a piece of land held under Lot 1876, Pajakan No. 648 Mukim Plentong, Daerah Johor Bahru (the subject land).

The subject land which was originally registered in the name of the Federal Land Commissioner was designated as part of an army camp known as Kem Tebrau. Following a corporatisation policy of the Federal Government it was finally transferred to KCSB Konsortium Sdn Bhd (KCSB) on 30 July 1999 for the purpose of a mixed development project.

In consideration of the said transfer by the Federal Land Commissioner, KCSB was entrusted with the construction of a new army camp to replace Kem Tebrau.

For the purpose of implementing the project, KCSB in turn appointed the appellant as its attorney to carry out all the developments pertaining to the project.

The appellant is unable to proceed with the project as a substantial part of the subject land which is now known as Desa Perwira is being (as alleged by the appellant) illegally occupied by the respondents.

The Issue

The issue before this court is whether the respondent's continued occupation of the subject land make them 'squatters simpliciter' because no consent or licence was obtained by them from the registered owner whether past or present.

Contentions

Before us learned counsel for the appellant argued that somewhere in 1988, without permission, consent or licence of the then registered owner, the respondents had entered upon the subject land and purported to establish a settlement thereon.

Since such unlawful entry until about 1992, the respondents had through the assistance of various people managed to obtain basic amenities to their settlement such as water and power supply.

In or about July 1992, the respondents, for the first time purported to formally write to the then registered owner seeking permission to occupy the subject land, which request appears not to have been entertained by the then registered owner.

In the circumstances of the case it was contended by the appellant that the respondents were nothing more than squatters simpliciter attempting to create a right.

It was contended on behalf of the respondents that there existed an express or implied conduct or acquiescence by the authorities concerned of the respondent's continued occupation of the subject land following the supply of public amenities and allocation of funds for the development of the said settlement by various local authorities.

It was further contended by the respondents that the occupation by them of the subject land was not without the knowledge of Kementerian Pertahanan, the original beneficial owner. On the contrary, the said authority had supported

the respondent's application for water supply to be connected to the subject land. This according to the respondents is indicative of the Ministry's encouragement for the respondents to carry on staying on the subject land. This in turn amounted to implied conduct and acquiescence by the Ministry.

Decision

We shall begin by first referring to O. 89 of the Rules which provides a simple and speedy procedure for recovery of possession of land which is in wrongful occupation of trespassers. However it must be emphasised that this order will not apply to tenants holding over land after the termination of tenancy or tenancy or licence granted by any predecessor-in-title.

Order 89 r. (1) states:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor-in-title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

Order 89 was considered by the then Supreme Court in the case of *Bohari bin Taib & Ors v. Pengarah Tanah & Galian Selangor* [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48. In that case the forefathers of the appellant were pioneer settlers. Temporary occupation licences (TOL) had been granted to the appellant by the respondent on the understanding that separate titles to the land will be issued provided they continued to cultivate the land and remained with landless status. However the respondent did not keep to the understanding and handed over the land to FELCRA. The respondent on behalf of the State Government applied under O. 89 for possession of land. The issue before that court was whether the respondent fell within the ambit of O. 89.

The trial judge allowed the respondent's application. The appellant appealed to the Supreme Court. The court held that there are a number of issues which could not be decided by affidavit evidence and as such the case should not have been tried summarily under Order 89.

Mohamed Azmi SCJ (as he then was) observed:

> They claim that they are not squatters of state land in the popular and normal sense, but are either licensees holding over or lawful occupiers of state land with the continued consent of the State Executive Council under the approved alienation. If their occupation of the land is with the continuing consent, implied or expressed, of the state authority, then notwithstanding the expiry of their TOLs, O. 89 is not the proper procedure to be adopted.

Further in the judgment, the learned judge had this to say:

> It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code 1965.

Reverting to the appeal before us, we observe that the learned judge in dealing with the issue before him had made reference to a number of documentary exhibits ie, DP2, DP3, DP4, DP5 and DP6. In particular the learned judge placed much emphasis on exh. DP3. DP3 is a letter dated 19 January 1993 written by the Johore State Assembly Speaker to the Pengurus Daerah Kanan, Tenaga Nasional Berhad with a recommendation that the subject land be connected with electricity supply. Paragraph 2 of the letter reads as follows:

> Untuk makluman pihak tuan perkara ini juga telah dimaklumkan kepada Y.B. Dato' Menteri Besar Johor agar pembekalan tersebut dapat diteruskan segera sebelum bulan puasa ini yang mana juga segala perbelanjaan dan peruntukan kecil telah pun dikeluarkan oleh pihak Kerajaan ke kawasan berkenaan.

The next exhibit referred to by the learned judge is DP6. This is a letter from the 'Setiausaha Sulit Kanan kepada Menteri Pertahanan' responding to the respondent's request to have water supply connected to the subject land. It was stated in the letter that the Ministry had no objection to such request.

The next exhibit which is of much significance referred to by the learned judge is DP5. This is a letter written by the respondents to the Ketua Pengarah Tanah Persekutuan (the original registered owner) asking for permission to be allowed to remain in occupation of the subject land while at the same time informing the Ketua Pengarah that they were already in occupation of the subject land since 1988.

The most important of all the exhibits referred to by the learned judge is DP8. DP8 refers to the minutes of a meeting presided by none other than the Minister of Defence himself and attended by amongst others the Ministry's officials, representatives of the appellants and the respondents. The decision taken at that meeting reads as follows:

a

5.1.1 Bahagian Pembangunan dikehendaki menyerah tanah kegunaan Kementerian Pertahanan di Johor Bahru (jika ada) atau tapak lain di Kuala Lumpur yang senilai untuk menggantikan tanah KAUSAR (KCSB) bagi mengelakkan sebarang kerugian yang terpaksa ditanggung olih pihak KAUSAR. SBT (Setinggan Bekas Tentera) yang sedia ada terus kekal di tanahnya sekarang.

b

5.1.2 ADUN Bahagian Tebrau juga dikehendaki menyemak dengan Kerajaan Negeri jika terdapat tanah-tanah di Bandar Johor Bahru atau yang berhampiran untuk menempatkan SBT ini dengan kos yang terlibat di tanggung olih KAUSAR.

c Having considered the above-mentioned exhibits the learned judge said:

> On the facts as disclosed in the affidavits and evidence attached thereto the main issue before the court is whether the defendants could properly be termed or described as squatters simpliciter. If it is so then O. 89 is properly invoked by the plaintiff. However, if it is otherwise, that is the defendants cannot
> d possibly be described as squatters simpliciter and whether they occupy the said land with the consent or acquiescence of the plaintiff's predecessors-in-title is a triable issue then 0.89 is not in the circumstances the right procedure.

Further in the judgment his Lordship had this to say:

> e Reverting to the instant case it is apparent from the evidence produced by the defendants that there were positive encouragement from various government agencies for the defendants to stay put on the said land on a long term basis. All kinds of aids in the form of material and financial were given and allocated to make living comfortable for the defendants. All these assistance had undoubtedly given the defendants high expectation that they would be
> f allowed to remain on the land permanently. This belief, to my mind, had been further fortified by the decision taken at the meeting as exhibited in 'DP8' above.

The learned judge therefore concluded that there are issues to be tried and this is not a suitable case to be decided by affidavit evidence. This is not a fit
g and proper case to be dealt with summarily under O. 89 RHC. He therefore dismissed the appellant's application.

Based on all the affidavit evidence available before him and the reasons advanced by the learned judge, we find that there is nothing wrong with his
h decision to dismiss the appellant's application.

i

We find support for our decision in the case of *Salim Ismail & Ors lwn. Lebbey Sdn. Bhd. (No 2)* [1997] 1 CLJ 102. In that case the appellants had submitted that they occupied the land not only with the consent and knowledge of the State Government but also with their active encouragement, in that it had supplied the land with amenities such as water, electricity, asphalt roads, a kindergarten and a surau. That being so, the appellants contended that O. 89 is not the appropriate procedure for the respondent's action.

Dealing with the issue at hand the Court of Appeal speaking through Ahmad Fairuz b. Sheikh Abdul Halim J (as he then was) had this to say (at p. 108):

> ... Walaubagaimanapun, Jabatan-jabatan dan agensi-agensi Kerajaan telah memberi mereka kemudahan-kemudahan seperti air, api, telefon dan sebagainya. Malahan pihak Pegawai Daerah yang sepatut melaksanakan undang-undang di bawah Kanun Tanah Negara antara lainnya telah memberi izin kepada perayu-perayu untuk membina semula rumah-rumah mereka yang telah terbakar. Dengan adanya keterangan-keterangan sedemikian rupa, timbullah isu samada tindak tanduk agensi-agensi Kerajaan itu boleh ditafsirkan sebagai kebenaran Kerajaan Negeri. Ini adalah isu yang boleh dibicarakan. Kerana itu, tatacara di bawah Aturan 89 ini adalah tidak sesuai digunakan oleh responden. Justeru itu, Mahkamah ini telah membenarkan rayuan perayu-perayu dengan kos di sini dan di Mahkamah Tinggi.

The court also held that in the field of property law, equity is a potent protection of private rights operating upon the conscience of those who have notice of their existence.

The propriety of the application under Order 89 of the Rules was again the subject matter of an appeal in the Federal Court in the case of *Shaheen bt. Abu Bakar v. Perbadanan Kemajuan Negeri Selangor* [1998] 1 CLJ 74. There the court held that the summary procedure under O. 89 of the Rules is governed by the same principles as those under O. 14 of the Rules. The defendant need only show that there was a triable issue of law to resist the plaintiff's application.

Reverting to the facts of the present appeal, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. In our view, the alleged continued consent of the appellant's predecessors-in-title is one of the serious issues to be tried. The presence of the appellant's representatives at the meeting presided by the Minister of Defence (see DP8) cannot be overlooked.

From the judgment in *Bohari*'s case *(supra)* it is obvious to us that a court hearing an application under O. 89 considers only affidavit evidence. The persons against whom the proceedings is filed need only show they have an arguable case that they occupied the land under licence. In our opinion the principles laid down in *Bohari*'s case apply to the present case. From the affidavit evidence, we find that this is not a case to be dealt with summarily under O. 89. There are triable issues which should be determined at the trial.

We would observe that even if the respondent's initial entry on the subject land was unlawful as alleged by the appellants, acquiescence made such entry lawful (see *Salim*'s case, *supra*).

The respondents had been in occupation of the subject land since 1988. This fact was well within the knowledge of the Federal Land Commissioner and the State Government whose departments and agencies had provided public amenities to them. With the availability of such evidence, an issue arises as to whether the conduct of the government agencies could be interpreted as consent of the State Authority. We hold that this is a triable issue.

If the initial entry of the respondents on the subject land was unlawful, they had committed an offence under the National Land Code. They could also be evicted under O. 89 for being squatters simpliciter. However, from the evidence, although the State Government knew of their presence on the subject land from July 1989 no action was taken to charge them under the National Land Code for illegally occupying the subject land. No proceeding was taken to evict them under O. 89. The Menteri Besar was aware of the respondent's presence on the subject land and he approved an allocation of fund for the development of the subject land (see exh. DP3). He knew they were provided with water and electricity supply. When the subject land was transferred to KCSB (KUASAR), the donor of the power of attorney held by the appellants, it was aware of the presence of the respondents. In our opinion there is an arguable case that the respondents occupied the subject land with the acquiescence of the State Authority.

For the reasons which we have already stated above, we find that the respondents were not squatters simpliciter. As there are issues to be tried the case should not be dealt with summarily under O. 89. It is our unanimous decision that this appeal be dismissed with costs.